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EXAMINER

MARX, IRENE

ART UNIT	PAPER NUMBER
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1651

DATE MAILED: 04/27/2005

Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/753,381

Filing Date: January 02, 2001

Appellant(s): BEEK ET AL.

Kent A. Herink
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3/2/05.

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(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(7) *Grouping of Claims*

The rejection of claims 1-7 and 10-13 stands or falls together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) *Claims Appealed*

A substantially correct copy of appealed claims 1-7 and 10-13 appears on pages 10-11 of the Appendix to the appellant's brief. The minor errors are as follows:

The omitted text of the withdrawn claims is as follows:

8. (Withdrawn) An animal feed supplement comprising:

a source of at least one exogenous enzyme having enzyme activity selected from the group consisting of α -amylase, α -galactosidase, β -glucanase, cellulose, lipase, protease and xylanase activities; and

a surfactant selected from the group consisting of lysolecithins.

9. (Withdrawn) An animal feed supplement as defined in claim 8, wherein said surfactant comprises at least about 25 percent and up to 100 percent lysolecithin.

In addition, an error occurs in claim 10, line 2 in the repetition of "at least".

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(9) Prior Art of Record

No prior art is relied upon by the examiner in the rejection of the claims under appeal.

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

a) The rejection of claims 1-7 and 10-13 under 35 U.S.C § 112, first paragraph.

Claims 1-7 and 10-13 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

It is noted that withdrawn claims 8 and 9 were erroneously included in the rejection under 35 U.S.C § 112, first paragraph.

No basis or support is found in the present specification for:

1) the recitation of “lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids.”

Applicant has indicated that support is found at bridging paragraph between pages 4 and 5, which pertains specifically to two unidentified products designated “lysoprin” and “Bolec” and in the footnotes to Table 1 and Table 2. However, mixing and matching the disclosure at these locations is not seen to support the recitation “lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids.” The insertion of this limitation is a new concept because it neither has literal support in the as-filed specification by way of generic disclosure, nor are there specific examples of the newly limited genus which would show possession of the concept of the use of “lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids.” In the examples, applicants use specific compositions and not compositions containing unlimited amounts of lysophospholipids as now recited in the phrase “at least”. It is noted that Lysoprin is disclosed as being “enriched” in lysophosphatidylcholine, not in any “lysophospholipid”. Bolec MT is

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disclosed as containing only lysophosphatidic acid and lysophosphatidylthethanolamine. This is not sufficient support for the new genus “lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids”.

This is a matter of written description, not a question of what one of skill in the art would or would not have known. The material within the four corners of the as-filed specification must lead to the generic concept. If it does not, the material is new matter. Declarations and new references cannot demonstrate possession of a concept after the fact. Thus, the insertion of “lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids” is considered to be the insertion of new matter for the above reasons.

2) the results claimed at claims 10 and 13.

Applicants have indicated that support is to be found for claim 10 in Table 2. Yet the results of Table 2 pertain to a specific surfactant preparations and enzymes and these results cannot reasonably be extrapolated to the production of preparations as claimed in claim 10, comprising “lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids” to increase degradation of neutral detergent fiber by at least about 50% over degradation by exogenous enzyme alone.

Basis or support for this material is lacking in the instant specification.

Similarly, the basis and support is not found in the instant specification for the limitations in claim 13 regarding the reduction of exogenous enzyme in the range of none to 50% without reducing the degradation of neutral detergent fiber in the process

Please see *Gentry Gallery v. Berkline* 45 U.S.P.Q.2d 1498 for a discussion related to broadening the claimed invention without support in the as-filed specification. Please see *PurduePharma v. Faulding* 56 U.S.P.Q.2d 1481 for a discussion related to a failure to describe a claimed generic concept in the narrative portion of the specification, but rather basing support on limitations in examples.

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(11) Response to Argument

Appellant argues that the new language defines the term "lysolecithins" and that he believes that there is support in the specification for the new recitation. Specifically, Appellant argues that support can be found in the specification in the paragraph bridging pages 4 and 5, where Lysoprin and Bolec MT are recited to be crude lecithin which has been enzymatically enriched in lysophospholipids (lysophosphatidylcholine in the case of Lysoprin and lysophosphatidic acid, lysophosphatidylethanolamine, lysophosphatidylinositol, and lysophosphatidylcholine in the case of Bolec MT) and further that they were determined to have approximately 33% lysophospholipids. Appellant also relies on a footnote that indicates that a surfactant containing approximately 16% Lysoprin was used, and footnote 3 of Table 2 recites that S3 is a surfactant containing approximately 16% Bolec MT. Accordingly, S2 and S3 each contain approximately 33% times 16% or 5% lysophospholipids.

However, Appellant has not indicated where specific basis is found for the claim designated recitation of "lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain **at least 5%** by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids". The amount "at least 5%" is a range of 5-100%.

With regard to the references cited for the analysis to be used (Specification, bridging paragraph between pages 4 and 5) and the U.S. Patent No. 6,068,997 referred to in footnote 5 to Table 2, Appellant did not incorporate these materials by reference.

The issue is not what one skilled in the art would know or recognize but the specific disclosure provided in the as-filed specification to support the invention as claimed.

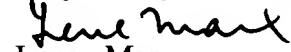
It is the Examiner's position that the instant specification fails to provide a proper written description for the recitation of "lecithins that have been enzymatically enriched in the amounts of lysophospholipids to contain at least 5% by weight of lysophospholipids to the amount of lysophospholipids plus phospholipids".

Appellant did not specifically address the aspects of the rejection that pertain specifically to claims 10 through 13.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,



Irene Marx

Primary Examiner

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April 25, 2005

Conferees

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